Grinnell Fire Protection Systems Company *and* Gerald F. Olson. Case 18–CA–11658

July 22, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 29, 1992, Administrative Law Judge Gerald A. Wacknov issued the attached decision. Charging Party Olson filed exceptions and a supporting brief and a motion to reopen the record and/or motion for a new trial.[1] The Respondent filed an answering brief and a brief in opposition to the Charging Party's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Grinnell Fire Protection Systems Company, Bloomington, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Joseph H. Bornong, Esq., for the General Counsel.

[1] The Charging Party filed a motion for a new trial which effectively includes a motion to reopen the record.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the Charging Party's motion to reopen the record and/or motion for a new trial, the Charging Party first contends that ''new evidence became available'' after October 3, 1991. In this regard, we note that the Charging Party's motion fails to comply with the requirements of Sec. 102.48(d)(1) of the Board's Rules and Regulations. Sec. 102.48(d)(1) provides, inter alia, that the movant shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. The Charging Party's motion fails to specify any new evidence to be adduced, it fails to state why the evidence was not presented earlier, and it fails to specify how the evidence would require a different result.

The Charging Party also contends that the judge was biased against him. We are satisfied that the Charging Party's contention in this regard is without merit. Careful review of the record and the judge's decision shows no statements or other evidence indicating bias, or a partiality to the Respondent's case, on the part of the judge.

Accordingly, for the above-stated reasons, the Charging Party's motion to reopen the record and/or motion for a new trial is denied.

John J. McGirl Jr., Esq. and *James B. Ohly, Esq. (Doherty, Rumble & Butler)*, of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Minneapolis, Minnesota, on October 3, 1991. The charge was filed by Gerald F. Olson, an individual, on March 7, 1991. An amended charge was filed by Olson on June 19, 1991. Thereafter, on June 27, 1991, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Grinnell Fire Protection Systems Company (the Respondent) of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent's answer, duly filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture and nonretail sale, distribution, installation and service of fire protection equipment, and maintains an office and place of business in Bloomington, Minnesota. The Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of Minnesota, and annually sells and ships goods and materials valued in excess of $50,000 directly to points outside the State of Minnesota.

It is admitted, and I find, that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that Sprinkler Fitters and Apprentices Union No. 417 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the Union) is, and at all material times herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(3) and (4) of the Act

by refusing to recall or rehire Gerald Olson as a journeyman sprinkler fitter because he filed a grievance and an unfair labor practice charge protesting a prior layoff.

B. *The Facts*

Gerald Olson is a journeyman sprinkler fitter and last worked for the Respondent from about February 1988 until his layoff on August 22, 1990. His supervisor was Ray Salaba, Respondent's superintendent. Olson phoned Salaba shortly after the layoff. Olson testified that:

> Well, I called Ray Salaba because I was very upset. I had worked at Grinnell for a year and a half. I've had no problems there at all during that year and a half, and I knew that they was getting ready to gear up for the Mall of America, to hire 15 to 20 people at that Mall of America.

During the phone conversation Olson asked Salaba why he had been laid off at the time that the Respondent was getting ready to hire people for a large project, the Mall of America job, and whether he could just take a couple of weeks off and come back to work. Salaba, according to Olson, said, ''No . . . you'd better look for another job.'' Salaba also suggested that Olson call Ed Heineke, Respondent's foreman for the Mall of America job, and ask him about work at that jobsite. Olson protested and asked why he should have to see Heineke when Salaba was the person who did the hiring and the laying off. Olson testified that he believed that Salaba ''just wanted to brush me off.'' He asked Salaba, ''Well, why should I have to kiss anybody's ass to get a job.'' Salaba, according to Olson, reiterated that Olson should call Heineke about the job, and the conversation ended. Olson admitted that he was ''upset and disappointed'' with the whole situation.

On cross-examination, Olson admitted that he very much wanted to work on the Mall of America job as it was close to his home. He testified that during the conversation with Salaba he called the Respondent a ''horseshit'' company, and the Union a ''chickenshit'' union, but denied that he told Salaba that ''he could stick the job up his ass.''

Olson believed that his layoff was improper and was not due to lack of work, but for some other reason, as it appeared that the Respondent was seeking to hire other journeymen at the time of the layoff. Therefore, he claimed that he and two other journeymen who were laid off about the same time were discharged without just cause in violation of the collective-bargaining agreement. The Union agreed with Olson's position, and filed a grievance on behalf of Olson and the two other employees. These two employees later withdrew their names from the grievance.

Olson also believed that his layoff was in retaliation for his activity as a union steward on several jobs during the summer of 1990 and, on October 16, 1990, filed a charge with the Board alleging this as a reason for his layoff. Olson was told that there was insufficient evidence to warrant the issuance of a complaint, and his charge was dismissed.

The grievance proceeded to arbitration on February 7, 1991. It is admitted that at the arbitration hearing, Construction Superintendent Salaba was asked by the Union's attorney why Olson had yet to be recalled. Salaba replied, ''because of the grievance.'' He further explained that he felt he was ''being blackmailed by the grievance and the NLRB charge.'' On May 3, 1991, the arbitrator issued an Opinion and Award denying the grievance. The arbitrator's opinion contains the following:

> There remains the ancillary argument of the Union relative to the Superintendent's statements during the course of the proceedings, indicating that the Grievant may have been ''passed over'' by the Company when it was hiring journeymen for the Mall of America project in October and November of last year. When asked why the Company did not take the Grievant ''off the bench,'' Salaba acknowledged that his name came up, but that he was not hired because of the pending grievance. While this expressed motivation may be relevant under the National Labor Relations Act as the Union charges, it is nevertheless a matter which is beyond the scope of my jurisdiction as the Neutral Arbitrator in the immediate dispute. At the same time however, it does not change the conclusions reached here relative to the Company's motivation when it released Mr. Olsen (sic) in August of 1990. As previously stated, the preponderant evidence in this regard fails to support a finding of any ill-will exhibited toward the Grievant when he was laid off. Indeed it would appear to be just the opposite, as the record demonstrates Management's attempt to retain him while other journeymen were being laid off.

Salaba testified that Olson and two other sprinkler fitters were laid off at about the same time for lack of work. One employee was laid off on August 16, another on August 17, 1990. Olson was not laid off until August 22, 1990, as Salaba offered Olson several more days of work in exchange for Olson's agreement to receive his final paycheck in the mail. The Respondent's contract with the Union provides that an employee is to receive his final paycheck at the time of layoff unless the employee agrees that it may be sent to him in the mail.

Salaba testified that Olson phoned him on August 23, 1990. Salaba told Olson that the Respondent had no work for him at that time. Olson offered to take 2 to 3 weeks off if Salaba would promise to put him on the Mall of America project at the end of that period. Salaba told him that he had no intention of putting him on the Mall of America project. Olson became very outraged and told Salaba to ''stick my job up my ass and went in a tirade of telling me we have a lousy company.'' He called the Union a ''chickenshit union, a bunch of kiss asses.'' He again told Salaba to ''stick my job up my ass, and he was never going to work for Grinnell again.'' Salaba said that he should stop the profanity, that the conversation should end on an up note, and that his check was in the mail.

Salaba testified that he was not interested in hiring Olson for the Mall of America job because it was a very large project which required journeymen sprinkler fitters to work independently without close supervision. Salaba believed that Olson seemed to work better when there was closer supervision of his work. However, Salaba acknowledged that he would have considered Olson for work at other projects. Salaba could not recall whether he told Olson, during the aforementioned phone conversation, to call Ed Heinke, the

project construction superintendent for the Mall of America job. Salaba explained that if he did suggest that Olson could ask Heinke about a job, it was because Heinke was in charge of that project and had the authority to hire whomever he chose.

Salaba said that he was ''flustered . . . rattled . . . and irritated,'' because of Olson's outburst after Salaba had extended himself and had found several extra days of work for Olson prior to his layoff. Immediately after the phone conversation, Salaba reported the matter to his immediate supervisor, District Manager Douglas Pfaff. Pfaff also became irritated with Olson's belligerent attitude after Salaba had found additional work for him, and Salaba and Pfaff agreed that they had every intention of honoring Olson's request, namely, that Olson would never work for Grinnell Fire Protection again.

Salaba testified that at the arbitration hearing he was asked by the Union's attorney why Olson had not been recalled. Salaba was surprised with the question, and ''dumbfounded'' that Olson would want to be recalled after saying that he never wanted to work for the Respondent again. Further, Salaba did feel that he was being ''blackmailed'' by the grievance and the NLRB charge in an effort to cause the Respondent to hire Olson for the Mall of America job, and believed that the grievance and the charge were a form of harassment by Olson as Olson knew that his layoff, as well as the layoffs of the two other employees, was for no other reason than lack of work. Salaba admits answering at the arbitration hearing that Olson had not been recalled because of the grievance he filed. However, as noted above, it had already been decided, prior to the filing of the grievance or the NLRB charge, that Olson would not be rehired because of his belligerent and insubordinate remarks during the August 23, 1990 phone conversation.

District Manager Douglas Pfaff, who did not attend the arbitration hearing, corroborated Salaba's testimony regarding the fact that it was decided on August 23, 1990, that, pursuant to Olson's request, he would never work for the Respondent again.

C. *Analysis and Conclusions*

I credit the testimony of Construction Superintendent Salaba, and find that Olson made the remarks attributed to him by Salaba. I do not credit Olson's testimony to the extent that it differs with that of Salaba. The fact that Salaba could not recall whether he suggested that Olson could apply for a job with Project Superintendent Heinke at the Mall of America site, does not alter my conclusion that Salaba's testimony regarding the material portions of the conversation is credible. Moreover, the record indicates that Salaba gave the same testimony at the arbitration hearing, prior to the time any question had be put to him about why Olson had not been recalled. While the arbitrator does not specifically recount Salaba'a testimony, the arbitrator's Opinion and Award notes that there was a ''heated discussion'' during the phone conversation, and that Salaba maintained that he ''encountered angry and vulgar statements from [Olson] which were completely unjustified and improper.''

I credit the testimony of Salaba and District Manager Pfaff, and find that they both decided, on August 23, 1990, that Olson would never again work for the Respondent after making the aforementioned contemptuous remarks during the phone conversation.

The General Counsel maintains that the Respondent has violated Section 8(a)(1) of the Act by Salaba's statement at the arbitration hearing that Olson had not been recalled due to the filing of the grievance. It appears that during the arbitration proceeding Salaba was clearly upset by what he deemed were intentionally false allegations by Olson which were advanced for the purpose of coercing the Respondent to rehire him for the Mall of America project, and that Salaba truly believed that under the circumstances Olson's false and unwarranted grievance was, itself, a valid reason to deny Olson future employment. Whatever Salaba's subjective motivation for making such a statement, it clearly was coercive in nature in that it would reasonably tend to inhibit employees from filing grievances under the union contract for fear of retaliation by the Respondent; it was expressly made, and was never timely explained or retracted in a manner which would allay the fears of employees or union representatives that employee's jobs may be in jeopardy if they filed grievances against the Respondent, whether meritorious or not. See *St. Regis Paper Co.*, 247 NLRB 745, 748 (1980); *Berwick Forge*, 237 NLRB 337, 341 (1978); *Jack Holland & Son, Inc*., 237 NLRB 263, 265 (1978).

Contrary to the Respondent's assertions in its brief, I do not conclude that Olson's activity in filing the charge and the grievance was undertaken for purposes of harassment and that, therefore, it constituted unprotected activity for which the Respondent could have lawfully refused to rehire or recall Olson. The record evidence shows that Olson considered himself to be a highly proficient employee and that he simply could not conceive that his layoff and/or the refusal of his request to be placed on the Mall of America project was for legitimate business reasons. He exercised his right to advance various reasons of his own so that he would be hired for the project. Indeed the Union, in the grievance matter, supported his position that the layoff was not due to lack of work, as it appeared that the Respondent was seeking to hire other employees at about the same time. In support of this position, according to the arbitrator, the Union demonstrated that it did receive a letter from the Respondent on or about August 15, 1990, indicating the need for additional journeymen. However the arbitrator found that, as maintained by the Respondent, the letter was in error and that the Respondent was actually seeking to hire additional apprentices rather than journeymen. The fact that the grievance and the charge were found to have no merit does not mandate the conclusion that Olson did not believe their allegations. See *Key Food Stores Coop*., 286 NLRB 1056, 1070 (1987). Cf. *Leviton Mfg. Co*., 203 NLRB 309 (1973), revd. 486 F.2d 686 (1973).

Accordingly, I conclude that by Salaba's statement at the arbitration hearing, the Respondent has violated Section 8(a)(1) of the Act, as alleged.

I do not find, however, that the Respondent has violated Section 8(a)(3) and (4) of the Act by failing to rehire or recall Olson. While Salaba stated at the arbitration hearing that he felt he was being blackmailed by Olson's filing of what he deemed to be a clearly nonmeritorious grievance and NLRB charge, and that Olson had not been recalled because of his filing of the grievance, the record evidence does not support the General Counsel's contention that Olson would

have been recalled if he had not filed the charge or the grievance. Rather, the credible record evidence supports the Respondent's position that it decided, on August 23, 1990, that Olson would not be hired thereafter as a result of the belligerent and insubordinate statements he made to Salaba, and that this decision, rather than the filing of the charge or the grievance, was the true and lawful reason for refusing to offer Olson further employment. I so find. See *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1980).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has engaged in violations of Section 8(a)(1) of the Act as found.
4. The Respondent has not violated Section 8(a)(3) and (4) of the Act as alleged.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice attached hereto as ''Appendix.''

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Grinnell Fire Protection Systems Company, Bloomington, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Stating to employees or union representatives that employees will not be hired or recalled to work because they filed grievances against the Company.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's Bloomington, Minnesota facility copies of the attached notice marked ''Appendix.''[2] Copies of said notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's representative, shall be posted by it immediately upon receipt and maintained by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT make statements to employees or union representatives that employees will not be recalled or rehired because they have filed grievances against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

GRINNELL FIRE PROTECTION SYSTEMS COMPANY